IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-53

No. ~~1091~~

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION AND WELFARE,
Appellant

v.

RAYMOND BELCHER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BRIEF FOR UNITED MINE WORKERS OF AMERICA AS AMICUS CURIAE

EDWARD L. CAREY
HARRISON COMBS
900 Fifteenth Street, N.W.
Washington, D. C. 20005

M. E. BOIARSKY
512 Kanawha Valley Building
Charleston, W. Va. 25301

Counsel for United Mine Workers of America as Amicus Curiae

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

INDEX

TABLE OF CONTENTS

TABLE OF CASES

STATUTES, CONSTITUTION AND RULE

MISCELLANEOUS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1091

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION AND WELFARE,

Appellant

v.

RAYMOND BELCHER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BRIEF FOR UNITED MINE WORKERS OF AMERICA AS AMICUS CURIAE

INTEREST OF UNITED MINE WORKERS OF AMERICA

This brief *amicus curiae* is filed by United Mine Workers of America (called "UMW") with consent of the parties, as provided in Rule 42 of this Court's Rules.

UMW is an international labor union representing about 225,000 members who, since the early 1940's, have produced from 75 to 82 per cent of the bituminous coal industry's total production.

Regarded as one of the nation's most hazardous employments, as recently as 1969 the frequency rate of disabling injuries per 1,000,000 man-hours for underground coal mining was 31.86 and 9.36 for surface mining

as compared with 8.08 for all industries.[1] UMW's workmen's compensation departments of its various districts throughout the United States in the period 1964 through 1967 handled 37,068 claims; and during 1968's first six months, 6,946 claims were handled.[2] The annual report of the West Virginia Workmen's Compensation Fund for the year ending June 30, 1970, records (pp. 15, 28) that the State's coal mining industry reported 15,022 accidents, which represented 41 accidents per million dollars in wages.

Traditionally, union members have looked to their labor union for help in problems associated with their working conditions. This Court's *Lewis* v. *Benedict Coal Corporation,* 361 U.S. 459, 468 records recognition of UMW's long struggle to provide security for its members and their families to enable them to meet problems arising from unemployment, illness, and old age and death. As a service agency,[3] UMW's interest in its members' welfare, singly and collectively, does not cease when a member becomes injured. Its activities include enforcement of workmen's compensation statutes. *UMW, District 12* v. *Illinois State Bar Assn.,* 389 U.S. 217. Hence, where, as herein, a federal district court[4] has held unconstitutional the federal statute reducing the social security benefits to which UMW's members are entitled by offsetting therefrom workmen's compensation awards, UMW's interest in seeking to uphold the district court's rejection of the statute is manifest.

---

[1]"*Accident Facts*", 1970 Ed., published by National Safety Council, 425 N. Michigan Avenue, Chicago, Illinois 60611, p. 26.

[2]Joint Report of the International Officers, Constitutional Convention, 1968, p. 90.

[3]*Local 357, Teamsters* v. *NLRB,* 365 U.S. 667, 675-76.

[4]United States District Court for the Southern District of West Virginia (at Bluefield). Its opinion is reported as *Belcher* v. *Richardson, Secretary of Health, Education and Welfare,* DC, S.D. W. Va., 1970, 317 F.Supp. 1294.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE SOCIAL SECURITY STATUTE'S OFFSET PROVISIONS ARE UNCONSTITUTIONAL.

A. The District Court Properly Adopted This Court's Rationale of *Goldberg* v. *Kelly*, Which Appellant Ignores.

Section 224 of the Social Security Act (Section 424a of Title 42, United States Code), together with the relevant Department of Health, Education and Welfare regulations, are set forth in Appendix B, pp. 24-41, of Appellant's Jurisdictional Statement.

Thereunder, for any month in which an individual under 62 years of age is entitled to both social security benefits and periodic workmen's compensation benefits under any federal or state law, that individual's social security benefits are required to be reduced by the amount by which the total benefits received under social security and workmen's compensation programs for the month exceeds the higher of 80 per cent of the individual's average current earnings or the total of certain other designated disability benefits. Because Appellee Belcher was receiving workmen's compensation benefits under West Virginia law, his disability benefits were reduced pursuant to Section 224. In a proceeding in the district court, Section 224 was held unconstitutional because a social security recipient has a "property right status", protected by the U.S. Constitution's Fifth Amendment's due process clause and Section 224 discriminated against Appellee Belcher by requiring reduction of social security benefits and depriving him of property without due process of law (J.S. App. A 11-19).[5]

[5]The abbreviation "J.S." refers to Appellant's Jurisdictional Statement herein. The abbreviation "J.S. App. A", followed by a page number, refers to the page in Appendix A to the Jurisdictional Statement.

Unless otherwise indicated, all emphases herein are supplied.

The district court regarded Appellee Belcher's claim that the statute's offset provisions deprived him of "property (benefits) without due process of law" to depend on whether he "has such an indefeasible right or interest in his social security benefits that the concept of due process precludes" their application (J.S. App. A 15).

The district court recognized this Court's majority holding in *Flemming* v. *Nestor*, 363 U.S. 603 (1960), with then-Chief Justice Warren and Justices Black, Brennan and Douglas dissenting (363 U.S. 621-40), that old-age benefits of an alien, deported for cause under the Immigration and Nationality Act, could be lawfully terminated without offending the Fifth Amendment's due process clause. But, relying upon this Court's majority ruling in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), which was written by Justice Brennan—a dissenter in *Nestor*—and which, as the district court declared, "tends to elevate entitlement to welfare to the status of a property right and to surround it with all the safeguards required by due process" (J.S. App. A 16), the district court concluded *Nestor "is no longer to be considered a viable and controlling precedent"* for the principle that "one who has contributed to the social security fund and later becomes eligible to receive the benefits provided by the Social Security Act has no indefeasible property right" thereto (J.S. App. A 17). In so holding, the district court noted this Court's supporting language that *"It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity'"* (J.S. App. A. 16). Additionally, *Goldberg* declared, "Much of the existing wealth in this country takes the form of rights which do not fall within traditional common-law concepts of property" and " '[s]ociety today is built around entitlement' " (397 U.S. ....., 25 L.Ed 2d 295). *Appellant's*

Jurisdictional Statement avoids and ignores all these significant words.

Implementing *Goldberg's* rationale, the district court declared "it must be determined that one who has made direct contribution to the social security fund and becomes entitled to disability benefits thereunder should . . be accorded equal status and protection" (J.S. App. A 16).

The district court reasoned logically that it would be patently unfair for a welfare recipient under *Goldberg* to be accorded a "property right status" attended by due process safeguards, and yet to deprive a social security recipient of such status and protection under *Nestor.* Appropriately, the district court declared the "distinction" is both "illogical" and "grossly inequitable" (J.S. App. A 16-17).

The district court's holding, supported by *Goldberg*, is consistent with the dissent of Justice Black in *Nestor* in which he avowed that social security benefits are not gratuities but the "products of a contributory system . . from employees and employers alike", pointing to legislative history which recognized social security as an *"earned right"* (363 U.S. 631).[6]

Even prior to *Goldberg*, this Court had shifted from *Nestor. Shapiro* v. *Thompson*, 394 U.S. 618, 627, fn. 6, avowed "constitutional challenge cannot be answered by

---

[6]Justice Black's dissent quotes a statement of Senator George, Chairman of the Senate Finance Committee, when the Social Security Act was passed. The quoted language appears in the district court's opinion (J.S. App. A 17), a portion thereof being (363 U.S. 631-32):

> "Social security is not a handout; it is not charity; it is not relief. It is an earned right based upon the contributions and earnings of the individual. *As an earned right, the individual is eligible to receive his benefit in dignity and self-respect.*"

the argument that public assistance benefits are a 'privilege' and not a 'right' ", a thesis adopted by *Goldberg* (397 U.S. 254); and *Sherbert* v. *Verner*, 374 U.S. 398, 404, declared "It is too late in the day to doubt that" constitutional rights "may be infringed by the denial of or placing of conditions upon a benefit or privilege".[7] Adherence to *Goldberg* is noted in *Daniel, Director, etc.* v. *Goliday*, 26 L.Ed 2d 57 (1970) and *Wheeler* v. *Montgomery*, 397 U.S. ....., 25 L.Ed 2d 307 (1970). See also *Hahn* v. *Burke*, 7 Cir., 430 F.2d 100.

Appellant's assertion that "*Goldberg* has no bearing upon the substantive validity of rational statutory limitations such as the qualification in Section 224 held invalid by the court below" (J.S. App. A 9) must be appraised in light of Appellant's disregard of *Goldberg's* language that "It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity' " (*ante*, p. 4).

B. The District Court Correctly Held That The Involved Workmen's Compensation Benefits Must Be Treated As A Contractual Entitlement.

The West Virginia Workmen's Compensation Fund, as the district court correctly declared, though state-operated and to which employees make no direct monetary contributions, is sustained by contributions from employers voluntarily electing to come under the provisions of West Virginia Code, Chapter 23 (J.S. App. A 14).

---

[7]In *Heikkila* v. *Celebrezze*, DC, N.D. Calif., 1963, 222 F.Supp. 629, where the wife of a deported alien was held entitled to social security benefits, *Nestor* was limited to its particular facts (pp. 631-32). In rejecting *Nestor's* thrust, the district court avowed it should not be extended "in creating an inequitable, unconscionable result as against an admittedly innocent citizen . . ." and would "work a punishment and penalty upon the widow" (p. 631).

The district court appropriately observed that under West Virginia authorities the workmen's compensation statute became "an integral part of the contract" of employment and emphasized the contractual nature of a workmen's compensation award.[8] Accord: *Reliford* v. *Eastern Coal Corp.*, 6 Cir. 260 F.2d 447, which recognized that an industry-wide collective bargaining contract in the coal industry, requiring employee coverage under workmen's compensation statutes, accorded affected employees a *contractual right.*

It is thus evident the district court correctly declared Appellee Belcher's workmen's compensation benefits could not be termed a "gratuity" but "rather they must be treated as a contractual entitlement" (J.S. App. A 14). Indeed, in *Truax-Traer Coal Co.* v. *Compensation Commissioner,* 123 W.Va. 621, 17 S.E. 2d 330 (1941), a workmen's compensation award was declared to be "in the nature of a judgment" and therefore "property" and "as such is the proper subject of constitutional protection" (p. 334).

C. The District Court Correctly Held That Section 224 Deprived Appellee Belcher of Due Process and Equal Protection of the Law Under the Federal Constitution.

The Fifth Amendment to the Constitution of the United States declares that no person shall "be deprived of . . property, without due process of law". The same Constitution's Fourteenth Amendment bars any State from similarly depriving any person.

Though *Nestor's* majority based its opinion mainly on the theory there is no "accrued property right" to social security benefits, it conceded (363 U.S. 611):

---

[8]*Gooding* v. *Ott,* 77 W. Va. 487, 87 S.E. 862; *Lancaster* v. *State Compensation Commissioner,* 125 W.Va. 190, 23 S.E. 2d 601; *Hardin* v. *Workmen's Compensation Appeal Board,* 118 W.Va. 198, 189 S.E. 670.

> "This is not to say, however, that Congress may exercise its power . . free of all constitutional restraint. The interest of a covered employee under the Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause."

Thus, *Nestor* admits Section 224 is not beyond the reach of the Fifth Amendment's due process requirements and that labeling benefits granted as a "privilege" and not a "vested right" in no way removes the social security system from requirements of fairness and rationality expressed in the due process clause and does not insulate the statute from judicial review for constitutionality. Further, that the Fifth Amendment incorporates the fundamentals of equal protection of law is established under *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954) and *Schneider* v. *Rusk*, 377 U.S. 163, 168 (1964), the latter avowing that "while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process' ".

This Court's *Sherbert* (374 U.S. 403) recognizes that only the gravest abuses, endangering paramount interests, give occasion for permissible limitation of constitutional rights and that no showing merely of a rational relationship to some colorable state or federal interest will suffice.

By congressional fiat Appellee Belcher was required to make tax contributions to social security in years of covered employment which, in part, were placed in the Federal Disability Insurance Trust Fund which Congress created [42 USCA 401(b)]. Now suffering disability from a work-connected injury, Belcher became and is entitled to receive workmen's compensation benefits. Under Section 224, social security benefits to which he

is admittedly entitled are reduced because of the receipt of workmen's compensation benefits. Still, another employee making the same social security tax contributions to the same Trust Fund and suffering a nonwork-connected disability is permitted by Congress to receive from the Trust Fund full social security benefits.

The district court accepted Appellee Belcher's argument that Section 224's offset provisions created arbitrary discrimination because two classes of disabled workers, essentially indistinguishable from each other except one is composed of disabled persons receiving workmen's compensation benefits and the other composed of disabled persons receiving benefits from private insurance plans or tort claim awards, so that on this sole difference benefits of the first class are reduced while those of the second class are left untouched (S. J. App. A 18).

The district court also accepted Appellee Belcher's contention that the offset provisions discriminated between those disabled prior to June 1, 1965 and those disabled after that date (J.S. App. A 18).

In rejecting Appellant's argument as to discrimination of the offset provisions on the ground that the purpose was to avoid duplication of public benefits, the district court declared "that no public funds are involved is made abundantly clear by" West Virginia Code, 23-3-1, which provides that the Workmen's Compensation Fund shall be supported by premiums and other funds paid thereto by employers, from which shall be paid all benefits due the employees or their dependents and expenses of administering the law (see Appendix A hereto) and that in West Virginia a workmen's compensation award is "an entitlement arising from a contractual relationship between employer and employee, sanctioned by law,

whereby each gave up a legal right in turn for a concomitant legal benefit" (J.S. App. A 18). Previous discussion herein (*ante*, pp. 6-7) demonstrates that Appellant's questioning (J.S. 7, fn. 8) of the district court's conclusion that workmen's compensation benefits are "private in nature" is abortive.

Further, the district court expressed its awareness of "several unreported decisions of district courts and . . *Bartley* v. *Finch*, 311 F.Supp. 876 (E.D. Ky. 1970)" which supported Appellant's position that Section 224 may be constitutionally applied, but rejected Appellant's invitation to accord "the issue raised in this case . . such cavalier treatment" because of *Goldberg* (J.S. App. A 16). In referring the Court herein (J.S. 7) to his Motion to Affirm in *Bartley* v. *Richardson*,[9] his citation of *Nestor* and *Dandridge* v. *Williams*, 397 U.S. 471, and argument that the involvement is only "with benefits provided by statute", and Appellant's citation herein of *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (J.S. 8, fn. 10), Appellant continues assiduously to ignore *Goldberg's* critical language (*ante*, p. 4).

Where, as herein, workmen's compensation and only workmen's compensation is chosen for the purpose of curtailing social security benefits, the district court's holding that Section 224 "cannot be constitutionally applied" because it deprives the social security applicant of due process and equal protection of the law under the Federal Constitution should be upheld by this Court (J.S. App. A 19).

---

[9]See Motion to Affirm in Case No. 703, now pending in this Court, at pp. 4-5 and footnote 4.

CONCLUSION

For the foregoing reasons, UMW urges that the opinion and judgment of the district court that the social security statute's offset provisions are unconstitutional are correct and this Court should sustain Appellee Belcher's Motion to Affirm and reject Appellant's request that probable jurisdiction should be noted.

Respectfully submitted,

EDWARD L. CAREY
HARRISON COMBS
900 Fifteenth Street, N.W.
Washington, D. C. 20005

M. E. BOIARSKY
512 Kanawha Valley Building
Charleston, W. Va. 25301

Counsel for United Mine Workers of America as Amicus Curiae

February, 1971

APPENDIX A

Workmen's Compensation Fund.

Chapter 23-3-1:

The commissioner shall establish a workmen's compensation fund from the premiums and other funds paid thereto by employers, as herein provided, for the benefit of employees of employers who have paid the premiums applicable to such employers and have otherwise complied fully with the provisions of section five [§23-2-5], article two of this chapter, and for the benefit, to the extent elsewhere in this chapter set out, of employees of employers who have elected, under section nine [§23-2-9], article two of this chapter, to make payments into the surplus fund hereinafter provided for, and for the benefit of the dependents of all such employees, and for the payment of the administration expenses of this chapter and shall adopt rules and regulations with respect to the collection, maintenance and disbursement of such fund not in conflict with the provisions of this chapter.

* * * *